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IN THE

Supreme Court of the United States

75-329

No. .....

October Term—1975

ROBERT R. KAUFMAN,

Petitioner,

v.

JAMES R. DUMPSON, Administrator of the Human Resources Administration of the City of New York,

Respondent.

PETITIONER'S REPLY BRIEF

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It is respectfully submitted that Respondent's counsels conclusion that the due process objections were examined by the Appellate Division of the New York Supreme Court are not reflected in the Court's Determination. It is true that they were raised by Petitioner and should have been passed on. The Court merely dismissed the petition without any opinion, and it is submitted without examining into said violation. Had they examined into such violations and followed the rule and pronouncement of the Court of Appeals of the State of New York dated May 14, 1974 which provided that:

> There is no doubt that the reason for the enactment of the statute (CPLR 7803) was to make it possible where warranted, to ameliorate harsh impositions of sanctions by the administrative agencies. That purpose should be fulfilled by the Courts not only as a matter of legislative intention, but also to accomplish what a sense of justice

> would dictate. Consideration of the length of employment of the employee without any alternative livelihood, his loss of retirement benefits, and the effect upon his innocent family all plays a role, but only in cases where there is absent grave moral turpitude, or injury to the public or department.

The Court would not have reached the determination it did. Here, there was absent any moral turpitude, or injury to the public or the department. Here petitioner was twice promoted by this same department since the charges of talking back to a supervisor were pending. Here there was no larceny or bribe taking, no wrong doing. The department was satisfied with petitioner's competency as was the Assistant Director that he was Administrative Assistant to. Only a personality difference was in fact alleged between petitioner and his former supervisor who no longer is working for the department. Here the Respondent's dismissal of petitioner, under the rule of the Court of Appeals, supra, does constitute excessive punishment, and it does violate the constitutional protection against such excessive punishment.

Respondent's counsel cites Matter of Pell, 34 N.Y.2d 222. This case is not analagous to the case at Bar and it does not stand for the proposition counsel submits since:

> The Pell case involves a school teacher who had taken a year's leave of absence with pay during the school year.

When he asked for more time off and it was refused, he falsified sickness, and was paid upon such false affidavits. The sharp divergence of facts, precludes any analogy whatsoever. In the Pell case he had been served with notices of personnel proceedings. In the case at bar it is conceded petitioner was not served with any notice of personnel proceedings. In the Appellate Division Respondent submitted an address that they supposedly served papers by registered mail. However when they were told that that was not petitioner's address and that they had no receipt for any registered mail, they conceded there was no such service.

> In the case at Bar Petitioner had requested access to his personal file many times and he was refused. Hence the apparent violation by Respondent of the Fair Disclosure Law likewise points up the need for immediate relief and the granting of the petition herein.

Respondent's counsel likewise cites Matter of Sowa v. Looney, 23 N.Y. 2d 329. This case likewise does not stand for the proposition of law submitted by Counsel. In the Sowa case it involved: A policeman was in a police car when the sexual advances were made to a 21 year old girl. The records established that Sowa was the only one assigned to the area and territory where the acts alleged were committed. Those facts involved criminal acts and not alleged insubordination. The court allowed circumstantial evidence to establish the factual situation and proof of the possible presence of Sowa at the place of the crime. Hence this does not do away with evidence to establish the case of the proponent. The leeway is granted to the Court to determine the area of latitude therefore.

The Civil Service Law Section 75 and 76 as submitted by Petitioner and contained in Appendix of the Court of Appeals at A1 and A2 recite the type of evidence and procedures that are required. (Now before this Court under subpoena duces tecum served by petitioner the file below and Court of Appeals and Appellate Division papers are encompassed by the above subpoena and are now before this Court.) In the case at Bar the hearing examiner examined an alleged personnel file which constituted a violation of the procedures (supra.) Likewise the respondent violated Informational No. 74-21; executive order No. 500 of September 23, 1971; and Article XVI; and Article IX, of the Union Contracts, as contained on pages 18 through 21 (procedure No. 2.10.1-73-72 of December 14, 1973 of Petitioner's Reply Brief in the New York State Supreme Court: Appellate Division brief now before this court under subpoena supra.) Hence counsel's recitation of alleged general rule is mistaken. The general rule recited in the statement of the Court of Appeals recapitulation of May 14, 1974, supra. The Court of

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Appeals in the Matter of Guminick v. Stewart, 30 N.Y.2d 684, held:

> The Superintendent of Insurance was required to examine fully every source of contemporary evidence within his central which would cast light on the sharp issue of credibility between the complaining witness and the petitioner. Guminick. The Court went on to say: to rest the penalty on the controverted testimony of one person without effort to develop all available material, or collateral matter, was in the circumstances of the case, less than full fairness to petitioners, even though as a matter of law, such testimony may qualify as substantial evidence. The order of the Appellate Division was modified and referred back with instructions.

In the case at bar the hearing examiner did not permit the search for the truth and cut off cross examination and hence violated petitioner's due process.

It is important to point out that Mr. Justice Frankfurter speaking for the Court in Universal Camera Corp. v. Labor Board, 340 U.S. 474 where the adoption by the Congress of the Administrative Procedure Act and the Taft Hartley Act were cited as bearing upon the degree of proof which should be required by the Courts in assaying what is substantial evidence, said at page 493:

> "surely an examiner's report is as much a part of the record as the complaint or testimony."

Here Mr. Grant, who was the assistant Corporation Counsel, conceded at Special Term of the Supreme Court that respondent had not served the report or decision (although duly demanded) until respondent served its answer in the Supreme Court below. Since section 75, subdivision #3, last line thereof provides:

> "A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge".

The respondent has once again violated the rights of petitioner and invaded his constitutional protection to his damage. Since respondent failed to serve the same when requested his violation is apparent.

CONCLUSION

The petition should in all respects be granted as prayed for.

Respectfully submitted,

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